IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 694.

UNITED AMERICAN LINES, *et al.*,
Appellants,

v.

HENRY C. STUART, ETC., *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

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BRIEF OF UNITED AMERICAN LINES, *et al.*, APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal under section two hundred and thirty-eight of the Judicial Code from a final decree of the District Court of the United States for the Southern District of New York, denying appellants' motion for an injunction and dismissing the amended bill (p. 7).

The appellants in this case are affiliated corporations engaged in the ownership and operation of five passenger steamships of American registry.

The allegations of fact, omitting jurisdictional averments, are in brief:

The ships owned and operated by appellants maintain regular sailings between New York and Plymouth, Boulogne, Southampton, Cherbourg and Hamburg (p. 25).

All of these vessels have been accustomed while within the port of New York to keep on board as part of their sea-stores, pursuant to regulations issued by the Treasury Department of the United States, intoxicating beverages for sale to their passengers upon the high seas (p. 26).

The Attorney General of the United States on October 5, 1922, ruled that this practice, hitherto sanctioned by the Treasury Department, is illegal, and further ruled that ships of American registry, wherever they may be, are subject to the Eighteenth Amendment and to the National Prohibition Act (p. 26).

Accordingly, appellees threaten to confiscate the stock of liquors now on board the ships as sea-stores, and if appellants hereafter carry or sell any intoxicating beverages on their ships, whether upon the high seas or in foreign ports, to subject the appellants to criminal prosecution and to seize and forfeit the vessel on which they are carried or sold (p. 23).

If the liquors are confiscated and appellants are prevented from selling such beverages to passengers everywhere in the world, they will suffer

irreparable damage through diversion of passenger traffic to foreign lines (p. 27).

The bill prays for an injunction restraining the appellees from seizing the liquors or attempting to enforce any penalty or forfeiture by reason of the sale of intoxicating beverages by appellants to passengers upon the high seas or in foreign ports (p. 27), and for general relief (p. 28).

The answer admits the averments of fact contained in the amended bill, including the allegation of irreparable damage (pp. 21-22).

As matter of law, the appellants assert two rights.

1. The right to dispense intoxicating beverages to passengers upon the high seas and in foreign ports, independently of the question whether these may be lawfully brought within the three mile limit.

2. The incidental right to keep such beverages in reasonable quantity as sea-stores on board their ships, under the regulations of the Treasury Department, while within the ports and harbors of the United States.

These rights they could not assert except in this suit, without incurring the risk of forfeiture of their property as well as criminal prosecution.

As the incidental right to bring intoxicants into port as sea-stores is fully discussed in the other cases argued simultaneously with this, no argument on that point will be made in this brief.

ARGUMENT.

I.

THE TERRITORIAL SCOPE OF THE AMENDMENT AND PROHIBITION ACTS.

The scope of the Eighteenth Amendment is declared in its first section to be "the United States and all territory subject to the jurisdiction thereof."

The Amendment was not self-executing but required enforcing legislation.

Such legislation was authorized by the second section, as to which this Court said in the *National Prohibition Cases* (253 U. S. 350, 387):

> "The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section."

It follows that the liability of the property of the appellants to seizure or forfeiture depends, not merely upon the Amendment, since that provides no penalties or sanctions, but also upon the enforcing legislation enacted by Congress. Hence both must be considered.

The original National Prohibition Act (41 Stat. 305) contains no general provision defining the limits within which it shall be operative.

However, it does specifically provide in section twenty of title three:

> "That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors. . . . *Provided,* That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

The exception thus established for the Panama Canal will hereafter be specially referred to as indicative of Congressional intent.

By section three of the supplemental Act of November 23, 1921 (42 Stat. 222), it was provided:

> "This Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such Territory and Islands."

The territorial character of the National Prohibition Act is thus affirmed in virtually the same phraseology employed in the Eighteenth Amend-

ment, with the added words "including the Territory of Hawaii and the Virgin Islands."

Neither the Amendment nor the enforcing legislation mentions the sale of intoxicating beverages upon the high seas or in foreign waters or ports, or upon American ships while in those seas, waters or ports.

This omission the appellees seek to supply by construction or implication from the word "territory" as used in the Amendment and the Act of November 23, 1921. Their theory is that a vessel of American registry is territory subject to the jurisdiction of the United States. Upon that proposition both the opinion of the Attorney General and the decision of the District Court squarely rest.

II.

THE WORD TERRITORY AS EMPLOYED IN THE EIGHTEENTH AMENDMENT MUST BE CONSTRUED ACCORDING TO THE MEANING FIXED UPON IT IN OUR CONSTITUTIONAL HISTORY.

It is of course a cardinal rule of constitutional construction that words are presumed to have been used according to their plain, natural and usual signification and import, and not in a figurative or metaphorical sense (*Gibbons* v. *Ogden,* 9 Wheat. 1; *Brown* v. *Maryland,* 12 Wheat, 419; *Holmes* v. *Jennison,* 14 Pet. 540).

The framers of the Amendment, as Chief Justice Marshall tersely said in *Gibbons* v. *Ogden* (9 Wheat. 1), "must be understood to have employed words in their natural sense, and to have intended what they have said."

Or as was stated in *Tennessee* v. *Whitworth* (117 U. S. 139, 147):

> "Words in a constitution, as well as words in a statute, are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary."

It is also a truism that if the words used in a constitutional provision have acquired under our institutions a technical legal meaning, such words are to be taken in that sense (*Calder* v. *Bull*, 3 Dall. 386; *Thompson* v. *Utah*, 170 U. S. 343, 350). "The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed" (Cooley, Const. Lim., page 94).

Thus in *McPherson* v. *Blacker* (146 U. S. 1, 27), these familiar rules were applied in determining the legal meaning of the word "State", appearing in the clauses of the Constitution relating to presidential electors.

The word "territory", as its derivation shows, in its primary sense denotes land. It describes a district or country. The territory of a jurisdic-

tion or country extends to its boundaries (*The Danube*, 55 Fed. 993, 995).

Bouvier's Law Dictionary defines it as follows:

> "A part of a country separate from the rest and subject to a particular jurisdiction."

One of the definitions given by Webster is:

> "Any area or tract of a state not invested with full rights of sovereignty, but governed or ruled as a dependency or subject area, or having a legal system more or less peculiar to itself."

In the Eighteenth Amendment the word is used not alone, but in conjunction with and in contradistinction to "the United States". The language is "the United States and all territory subject to the jurisdiction thereof."

Within the limits of the United States, concurrent power of enforcement is granted to Congress and to "the several States." In territory not admitted to statehood, and therefore still in a "subject" condition, the power of Congress is of course plenary and exclusive.

As here employed, the word long ago acquired under our political institutions "a distinctive, fixed and legal meaning" (*Ex parte Morgan*, 20 Fed. 298, 304).

It denotes land acquired by the United States through discovery, cession or conquest, but not included in any State nor admitted to the Union.

In this sense its use antedates the Constitution.

In 1780 the State of New York delimited its western boundary, and ceded to the United States the "territory" to the west thereof. Similar cessions of "territory" were made by Virginia in 1784, by Massachusetts in 1785, and by Connecticut and South Carolina in 1787. The Continental Congress in 1780 resolved that "demesne or territorial lands shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states." This was followed by the ordinance of 1784 for the government of the territory ceded to the United States, which was superseded by the famous ordinance of 1787 "for the government of the territory of the United States northwest of the river Ohio."

Then came the Constitution, providing in its territorial clause (section three of Article four) that:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The word "territory", here occurring for the only time in the original text of the Constitution, was construed by this Court in *United States* v. *Gratiot* (14 Pet. 526, 537) thus:

> "The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands."

The words quoted are not, as the District Court seems to have thought, "a chance phrase".

On the contrary, the territorial clause of the Constitution has always been construed as referring to land subject to the dominion of the United States but neither constituting nor included in a State, in decisions too numerous and too well known for exhaustive citation.

Among the decisions are *Sere* v. *Pitot,* 6 Cr. 332, 336; *American Insurance Co.* v. *Canter,* 1 Peters, 511, 541; *Johnson* v. *McIntosh,* 8 Wheat. 543, 595; *Benner* v. *Porter,* 9 How. 235, 242; *National Bank* v. *Yankton,* 101 U. S. 129, 133; *Mormon Church* v. *United States,* 136 U. S. 1; *Downes* v. *Bidwell,* 182 U. S. 244; *Dorr* v. *United States,* 195 U. S. 138; *People* v. *Bingham,* 211 U. S. 468.

The authorities are copiously cited and reviewed in the learned opinions written by the several members of this Court in *Downes* v. *Bidwell* (182 U. S. 244).

From this body of accumulated precedent, both legislative and judicial, arises the elementary legal concept of "territory subject to the jurisdiction" of the United States.

1. It is land over which dominion or sovereignty has been acquired by discovery, cession, annexation or conquest.

2. While neither constituting nor included in a state, it is capable of admission to statehood in the discretion of Congress.

3. It may be, and usually is, vested in varying degree with the power of local self-government, including such authority to legislate concerning the conduct of its inhabitants as Congress may sanction. If granted legislative power, it is termed "organized territory", the determining feature being a local legislature as distinguished from a more rudimentary and less autonomous form of government (*Int. Com. Com.* v. *Humboldt*, 224 U. S. 474, 480).

Of course none of these attributes is possessed by a ship which is neither territory in a physical sense, nor in the sense in which the word is employed in the Constitution.

It has never been supposed that the territorial clause of the Constitution (Article four, section three) was the source of the power of Congress to enact laws relating to merchant vessels of the United States, or to the punishment of crimes thereon.

The power of Congress to legislate on these subjects has been always derived, according to the particular matter involved, from the commerce clause, the clause relating to admiralty and maritime jurisdiction, or the clause conferring power to define and punish felonies upon the high seas

(*United States* v. *Coombs*, 12 Pet. 72, 78; *United States* v. *Cole*, 5 McLean, 518; *The Lottawanna*, 21 Wall. 558, 580; *White's Bank* v. *Smith*, 7 Wall. 646).

It may also be observed that both in general legislation and in particular acts relating to navigation and foreign commerce, extending over more than a century, Congress has sedulously distinguished between "ships" and "territory" (1 Stat. 565; 2 Stat. 426; 2 Stat. 529; 3 Stat. 370; 3 Stat. 447; 3 Stat. 488; 3 Stat. 616; 10 Stat. 719; 32 Stat. 172).

III.

A SHIP IS NOT TERRITORY WITHIN THE MEANING OF THE EIGHTEENTH AMENDMENT OR THE ENFORCING LEGISLATION.

It is true that a ship is sometimes in fanciful or figurative language called part of the territory of the nation whose flag it flies. But that is a metaphor or analogy rather than a legal definition. And the books are replete with illustrations of its imperfect or misleading character, and with warnings against making it the foundation of a legal argument.

The doctrine of the so-called territoriality of ships is not a conception of the common law. It does not appear that it can be traced further back

than to the "Exposition des Motifs" put forth in 1752 by the Prussian Government to justify its behavior in confiscating funds payable to English creditors. In that document, it is said that "the Prussian vessels, although laden with property belonging to the enemies of England, were a neutral place, whence it follows that it is exactly the same thing to have taken such property out of the said vessels as to have taken it upon neutral territory" (De Martens Causes Cél. ii, 117).

"In its origin, therefore," says Hall in his treatise on International Law (p. 260), "the doctrine had just so much authority as belongs to a legal proposition laid down by an advocate whose law is notoriously bad. A few years later the idea reappears in Vattel, but he uses it only incidentally to explain a particular custom, and evidently without adequate consideration of its scope and bearings."

While judges and text writers have in certain cases invoked it by way of illustration or analogy, it is not of general application, such as would justify reading it into the words of the Constitution of the United States.

The remarks of Mr. Justice Lindley in *The Queen* v. *Keyn* (L. R. 2 Exch. Div. 63, 93-94) are apposite:

> "This contention renders it necessary to investigate the doctrine that a merchant ship

is part of the territory of the country whose flag she bears.

It is obvious that she is not so in point of fact; and it is easy to show that the doctrine holds good to a very limited extent indeed.

First, it is admitted that a foreign merchant ship, which enters the ports, harbours, or rivers of England, becomes subject to English law, her so-called territoriality does not in that case exclude the operation of English law.

Secondly. It is conceded that, even in time of peace, the territoriality of a foreign merchant ship, within three miles of the coast of any state, does not exempt that ship or its crew from the operation of those laws of that state which relate to its revenue or fisheries.

Thirdly. In time of war the so-called territoriality of a ship of one of the belligerents does not subject it to invasion or capture within three miles of a neutral coast.

Fourthly. In time of war the so-called territoriality of a neutral merchant ship does not exempt it from invasion in search of contraband of war.

Fifthly. In time of war this country has invariably denied that the territoriality of a neutral merchant ship protected enemy's goods on board; and although England has agreed with some nations that in future free ships shall make free goods (unless contraband of war), England resolutely maintains the old doctrine against all other nations.

> *In all these cases the territoriality of the ship becomes an unmeaning phrase, and care must be taken not to be misled by it, and not to allow the general assertion that a ship is part of the territory whose flag she bears to pass unchallenged, and to be made the basis of a legal argument*" (italics ours).

In *Chartered Bank* v. *Netherlands* (L. R. 10 Q. B. D. 521), it was contended that the liability for loss of cargo through collision on the high seas was governed by Dutch law since both vessels flew the Dutch flag. In refusing to sustain the contention, the same judge said (p. 544):

> "This reason is based on a very common and fruitful source of error, viz. the error of identifying ships with portions of the territory of the States to which they belong. The analogy is imperfect and often more misleading than the reverse, as I have endeavored to point out before. In this particular case the analogy appears to me more misleading than usual. I am not aware of any decision in this country to the effect that when two ships come into collision on the high seas the rights and liabilities of the respective owners have been held to depend on the laws of the respective flags of the ships."

Westlake says (International Law, Part I, p. 168):

> "These truths are often expressed by saying that a ship, even a merchantman, is a

floating part of the territory of her state, but that expression has the demerit of clothing in a fiction what can be conveyed with equal simplicity by stating the fact that a ship, no less than a territory, is a field of state action, state authority being present in her and on the high sea exclusive."

W. E. Hall says in his treatise on International Law (p. 263):

"International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thorough-going assertors of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it. (Manning, 276.) The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all cir-

> cumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of exterritoriality, which of course, cannot be brought into use as against a ship. This, however, the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied both by important states and by jurists of weight."

This Court has not hesitated to reject the view that a merchant vessel is a part of the United States, in the sense that persons on board are entitled to invoke the constitutional right of a jury trial, as long as they are outside the physical boundaries of the United States.

In re Ross (140 U. S. 453) was such a case. The petitioner Ross, a seaman, had committed the crime of murder on board an American merchant ship in the harbor of Yokohama. For this crime he was convicted in the American consular tribunal of Japan, without being accorded a jury trial. On *habeas corpus* he asserted that the ves-

sel on which his crime was committed was constructively a part of the United States, and that his constitutional right to a jury trial had been infringed.

This court said (p. 464):

> "By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* v. *United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. *The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States*" (italics ours).

This Court has also decided that a vessel of American registry is not territory subject to the jurisdiction of the United States, within the meaning of a statute whose language was similar to, though broader than, that of the Eighteenth Amendment.

In *Scharrenberg* v. *Dollar Steamship Company* (245 U. S. 122), defendant was sued for penalties under the Contract Labor Law (34 Stat. 898). The alleged infraction consisted of employing a Chinese seaman under contract upon an American ship.

It should be noted that the Attorney General in his opinion dismisses this case upon the assumption that it involved only the phrases "into the United States" and "into this country". This, however, is erroneous. The statute in question provided that

> "For the purpose of this Act the term 'United States' as used in the title as well as in the various sections of this Act shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone" (34 Stat. 908).

It was argued, in support of the claim, that the American vessel was part of the territory of the United States.

In deciding the case, this Court was therefore required to construe the words *"United States and*

any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone".

It is evident that this language is broader than that of the Eighteenth Amendment, which is "the United States and all territory subject to the jurisdiction thereof."

Mr. Justice Clarke, in delivering the opinion of the Court, held at page 127:

> "Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring 'in the United States' or 'performing labor in this country.' It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative (International Law Digest, Moore, vol. 1, Sec. 174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible. Thus the seamen employed on the 'Mackinaw' were not within either the spirit or the letter of the law on which the petitioner bases his action and in any point of view his contention is fanciful and unsound and must be denied."

See also *Foppiano* v. *Speed*, 199 U. S. 501; *Neilson* v. *Rhine*, 248 U. S. 205; *United States* v. *Innes*, 218 Fed. 705; *Taylor* v. *United States*, 207 U. S. 120; *Brown* v. *Duchesne*, 19 How. 183.

The cases cited in support of the assertion that merchant vessels are territory in the constitutional sense fall far short of sustaining that proposition.

None of these cases involves the construction of the word "territory" appearing in the Constitution or in any statute.

They may be broadly divided into three classes.

1. The first class comprises criminal prosecutions under statutes *specifically providing* for the punishment of offences committed upon the high seas, or in places within the admiralty and maritime jurisdiction of the United States.

Such are *United States* v. *Rodgers* (150 U. S. 249); *St. Clair* v. *United States* (154 U. S. 134); *Wynne* v. *United States* (217 U. S. 234); *Miller* v. *United States* (242 Fed. 907); *Pedersen* v. *United States* (271 Fed. 187).

These statutes are founded, not on the territorial clause of the Constitution, but on the power of Congress to regulate commerce and its power to define and punish felonies upon the high seas.

Any expressions in those decisions to the effect that merchant vessels are regarded constructively as territory must be taken by way of analogy or illustration, rather than as an exposition of the

legal construction of the word "territory" occurring in the Constitution or a statute.

2. The second class includes cases of treason or fraud directly obstructing the operations of the Government itself, which may be punished wherever committed by citizens, even if perpetrated in foreign countries. Here the *locus* is immaterial.

Such are *United States* v. *Greathouse* (4 Sawy. 457) and *United States* v. *Bowman* (U. S. Sup. Ct. advance opinions November 13, 1922).

3. In the third class fall cases dealing with the extent to which the several States may legislate concerning ships as property, as regards such subjects as taxation, liens, insolvency and rights of action for torts (*People ex rel. Pac. M. S. Co.* v. *Commissioner of Taxes*, 58 N. Y. 242; *Crapo* v. *Kelly*, 16 Wall. 610; *Lindstrom* v. *International Navigation Co.*, 117 Fed. 170; *Wilson* v. *McNamee*, 102 U. S. 572; *The Hamilton* (*Old Dominion S. S. Co.* v. *Gilmore*), 207 U. S. 402; *Martin* v. *West*, 222 U. S. 191).

These authorities tend rather to support than to defeat the appellants' contention.

If merchant vessels were territory of the United States in the constitutional sense, Congress would have the sole and exclusive power to legislate concerning them.

The several States would be bereft of all power, even though Congress had not acted.

But the authorities last cited uphold the validity of State statutes in cases where Congress is silent.

IV.

As a matter of statutory construction the prohibition acts negative the intention of Congress to extend their operation to vessels of the United States on the high seas or in foreign ports.

We approach consideration of the enforcing legislation with the maxim "all legislation is *prima facie* territorial" (*American Banana Co. v. United Fruit Co.*, 213 U. S. 347).

In examining the National Prohibition Act and the Act of November 23, 1921, several points at once strike the attention.

1. Neither act contains any reference to the "high seas", such as is invariable in the definition of offences against the peace and order of the community, where it is the intention of Congress to punish such offences if committed outside the strictly territorial limits of the United States.

The omission is peculiarly significant in the supplemental Act.

At the time it was passed, ships of American registry were openly selling intoxicating bever-

ages to their passengers outside the three mile limit. They were also accustomed to bring their sea-stores of these beverages into our ports, under seal, in accordance with the regulations promulgated by the Treasury Department.

The regulations had been published and had been in operation for nearly two years. They were a matter of common knowledge.

The original regulations (Treasury Decision 38218) were issued on December 11, 1919. The amended regulations (Treasury Decision 38248) were issued on January 27, 1920.

The first sentence of the amended regulations specifically referred to American ships. It read as follows:

> "All liquors which are prohibited importation but which are properly listed as *sea stores on American vessels arriving in ports of the United States* (italics ours) should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose."

It must be presumed that Congress, at the time it passed the supplemental Act, had knowledge of the construction previously placed on the National Prohibition Act by the department of the Government primarily charged with its enforcement (*Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 45).

The failure of Congress in the supplemental Act specifically to indicate its disapproval of the departmental construction indicates the adoption of such construction (*U. S.* v. *Cerecedo*, 209 U. S. 337; *Swigart* v. *Baker*, 229 U. S. 187-199; *New Haven R. R. Co.* v. *Interstate Com. Com.*, 200 U. S. 361).

Is it conceivable that if Congress had intended to make it a crime for American vessels to carry liquor as sea-stores for consumption by their passengers upon the high seas, it would have failed to include in the supplemental Act a specific provision referring to the high seas?

The inference thus drawn is reinforced by the recent decision of this Court in *United States* v. *Bowman* (decided November 13, 1922).

The opinion makes this distinction:

> "Crimes against private individuals, or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. *If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard* (italics ours). We have an example of this

in the attempted application of the prohibitions of the anti-trust law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Company* v. *The United Fruit Company*, 213 U. S. 347. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.

But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."

Neither the Eighteenth Amendment nor the National Prohibition Act can properly be con-

sidered as having been adopted for the purpose of enabling the Government to defend itself against treason, fraud or obstruction, affecting its operations as a Government.

Prohibitory legislation has always been justified on the principle that it is for the protection of the individual, and of the peace and order of the community, from the evil effects of intoxicating liquors. State legislation has uniformly been founded upon the police power to protect the public morals, peace and good order, and upheld solely as an exercise of that power (*The License Cases*, 5 How. 504; *Mugler* v. *Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1).

While prohibition is now constitutional as well as statutory, that fact cannot alter its essential objects and character.

It would seem clear, therefore, that offences against the National Prohibition Act belong in the first category described in the *Bowman* case, and the failure of Congress to include the high seas in its definition of the offence conclusively negatives the purpose of Congress in this regard.

2. Next we observe the absence of the words "ships" or "vessels of the United States" customarily employed in statutes defining offences upon the high seas (see Criminal Code, Sections 310, 301, 295, 293, 292, 291), as well as in acts relating to shipping (1 Stat. 287; Shipping Act, 1916; Ship Mortgage Act, 1920).

The only descriptive words which refer to water transportation are the words "boats" and "water craft" appearing in sections 21, 22, and 26 of Title II. These words are not ordinarily used to describe vessels capable of navigating the high seas. They are descriptive of small water craft. The nuisances referred to in the Act are such as could readily be maintained upon small water craft within our harbors or along our coasts. These words were construed in *The Saxon* (269 Fed. 639) where at page 641, the Court held:

> "The words used as applicable to the means of transportation by water are 'water craft' and 'boat'. Ordinarily the term 'boat' and the term 'craft' are applied to water transporting conveyances of small character. As a rule, the word 'boat' is used somewhat in contradiction to the word 'vessel'—'vessel' being a boat of larger size, generally one fitted to navigate the high seas; while 'boat' as a rule was applied to an undecked, small, open vessel.
>
> Anterior to the application of propulsion to small boats by means of gasoline, so as to bring them within the class of self-propelled vessels, the word 'boat' was usually applied to small, open vessels only, propelled by oars in the hands of oarsmen; although poetically, and otherwise, the term 'boat' may be sometimes applied to a vessel of any size. The word 'water craft', or the term 'craft', as

usually used, was applied to small vessels generally engaged in coastwise or domestic navigation. For larger vessels, as used in the present day, especially in the case of large iron steamships, the terms 'steamer', 'steamship', or 'vessel' are generally used. Unless, therefore, the generality of the language of the statute be sufficient to embrace vessels used in water transportation, of any size, and of any kind, the words of the statute in this case would not cover a large iron steamship."

3. As further evidencing the intention of Congress, it should be noted that the National Prohibition Act was enacted by the same (Sixty-sixth) Congress that enacted the Merchant Marine Act (41 Stat. 988). In the latter Act, Congress declared it "to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of . . . a merchant marine."

It is hard to believe that the Congress that declared this policy intended the National Prohibition Act to apply to American merchant vessels upon the high seas and in foreign ports, without an express declaration of such application.

4. A careful examination of all the debates in Congress preceding the adoption of the original and supplemental Act discloses that no word was uttered, either by those favoring or those opposed

to the legislation, indicating that either statute was deemed applicable to vessels of American registry outside our ports or waters. The scope of the word "territory" contained in the third section of the supplemental Act was discussed at length (Congressional Journal, Vol. 61, No. 96, pp. 5344-5345). In the debate Mr. Volstead expressed the following view as to section three:

> "The National Prohibition Act is in force in the Virgin Islands and Hawaii and the only object of this is to confer jurisdiction on the territorial courts of those Territories."

There was no suggestion by anybody that it was intended to include American ships.

5. The National Prohibition Act contains a clause that is altogether inconsistent with the view that Congress meant to enforce prohibition on the high seas.

It is found in section twenty of title three which provides:

> "That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt or spirituous liquors. . . . *Provided, that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.*"

The exception thus created for liquor in transit through the Panama Canal is not limited to foreign ships. It includes all ships, American or foreign. The words are "this section shall not apply." Certainly it was not created for the purpose of permitting importation of liquor into the Canal Zone, or sale to the inhabitants thereof, for these things are expressly forbidden.

Why then was the exception established? Manifestly because the Panama Canal is a link between two oceans.

If the intention was wholly to interdict the carriage and consumption of intoxicants upon the high seas, the exception is meaningless, so far as American ships are concerned. Can it be supposed Congress meant that it should be unlawful for an American vessel to carry liquors on the Atlantic ocean to the Canal, lawful to carry them through the Canal, and again unlawful to carry them, upon passing from the Canal to the waters of the Pacific?

On the theory that Congress did not intend to enforce prohibition upon the high seas, the exception of incidental transit from ocean to ocean through the Canal is entirely reasonable and consistent.

On any other theory, it involves the absurdity of supposing Congress to have granted express permission to do an act which must begin and end in the perpetration of a crime.

6. Strong practical reasons repel acceptance of the view that the prohibitory laws should be construed to embrace American ships upon the high seas or in foreign ports, unless they unequivocally so provide.

We do not allude to the obvious difficulty of enforcing prohibition upon American ships in foreign waters and ports, where alcoholic beverages are readily obtainable by passengers, seamen and stewards, although this might well serve to bring scandal and disrepute upon the administration of the law.

We refer to the essential difference between places that are at all times exclusively within our jurisdiction and places that are not.

Assuming a perfect enforcement of the law, it lies within the power of the United States to prevent all sales of beverages deemed intoxicating, both to our own and to foreign citizens, so long as they reside, sojourn or travel within our boundaries.

But the high seas are the highway of all nations, over which none has exclusive jurisdiction. There our passenger ships compete with those of other nations, which are far more numerous than ours, travel the same routes and offer equal accommodations. Our views as to prohibition are not shared by any other maritime nation of the world. No matter what our law may be, or how successful its enforcement, our government is powerless to prohibit the sale or consumption of

alcoholic beverages on the ships of other nations, beyond a marine league from our coasts.

No voyager desiring such beverages, if denied them upon ships of American registry, would be compelled to desist from their use, since at his choice he could travel by vessels on which they are procurable. Still less could abstinence be enforced in foreign ports.

Thus no real gain for prohibition or compulsory abstinence would be attained. The attempt to regulate the conduct of travellers upon the high seas and in foreign waters and ports would be inherently futile. That is the negative side.

The positive side is that certain nations, such as Belgium and Great Britain, require alcoholic liquors to be carried as sea-stores. Italy requires wine to be served to her people who are passengers. It can hardly be assumed that these countries will change their laws to conform with ours. On that point speculation is idle.

The present reality is that if vessels of the United States are held to be within the prohibitory mandate, it will be impossible for passenger ships of American registry to clear from English or Belgian ports, or to transport Italian subjects to America, without violation of the law.

The sole practical result thus accomplished would be an irreparable injury to our merchant marine.

In fact, the probable consequence would be the disappearance of our flag from the ocean routes,

so far as privately owned passenger vessels are concerned.

Such ships are indispensable to the development of a merchant marine, because they alone are capable of furnishing rapid transportation for cargoes, passengers and mails in time of peace, and of being converted into naval auxiliaries in time of war.

These considerations far transcend the mere question of property values. They affect the national prosperity and security.

7. This argument does not involve the denial, or the affirmance, of the authority of Congress, under its power to regulate commerce, to prohibit sales of intoxicating liquors upon ships of American registry, while upon the high seas or in foreign ports.

But it is clear from the language of the legislation, and circumstances attending its enactment, that Congress has not seen fit so to provide.

Conclusion.

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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